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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRAVEL SERVICES, INC.,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director, Virgin Islands
Bureau of Internal Revenue,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF TRAVEL AGENTS, HAWAII CHAPTER, AND THIRTY-TWO HAWAII TRAVEL AGENTS IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT REGARDING CONSENT OF THE PARTIES TO THE FILING OF THE BRIEF OF THE AMICI CURIAE	1
INTEREST OF THE AMICI CURIAE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Air Jamaica, Ltd. v. State Dept. of Revenue, 374 So. 2d 575 (Fla. App. 1979), *cert. denied*, 392 So. 2d 1371 (1980) 13
Allegheny Airlines, Inc. v. City of Philadelphia, 453 Pa. 181, 309 A.2d 157 (1973) 5
Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7 (1983) 3, 5, 7, 8, 11, 12, 13, 15, 16
Colautti v. Franklin, 439 U.S. 379 (1979) 7
Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) 8
Illinois Corporate Travel v. American Airlines, Inc., 806 F.2d 722 (7th Cir. 1986) 10, 16
Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9 (1st Cir. 1987) 6, 10
Mountain States Telegraph & Telephone Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) 7
Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941) 15
Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 7
Salem Transportation Co. v. Port Authority of New York and New Jersey, 611 F. Supp. 254 (S.D.N.Y. 1985) 13
State of Arizona ex rel., Department of Revenue v. Cochise Airlines, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1981) 6, 13
Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986) 11, 12, 13
Western Air Lines, Inc. v. Board of Equalization of South Dakota, 480 U.S. 123 (1987) 15
Western Air Lines, Inc. v. Hughes County, 372 N.W.2d 106 (S.D. 1985), *aff'd*, 480 U.S. 123 (1987) 15

STATUTES:

Airport and Airway Development Act of 1970, Pub. L. 91-258, 84 Stat. 219 ..... 8, 9
Airport Development Acceleration Act of 1973, Pub. L. 93-44, 87 Stat. 90 ..... 4, 6
Federal Aviation Act of 1958, Pub. L. 85-726, 72 Stat. 737 6

TABLE OF AUTHORITIES—Continued

	Page
Internal Revenue Code of 1986 (26 U.S.C.):	
§ 4261	8
§ 4271	8
§ 4291	8
§ 7501	8
Pub. L. 97-248, Title V, § 532, 96 Stat. 701	15
Revised Interstate Commerce Act, Pub. L. 95-473, 92 Stat. 1445	14
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1294	2
48 U.S.C. § 1613a(a)	2
48 U.S.C. § 1613a(b)	2
48 U.S.C. § 1613a(c)	2
49 U.S.C. § 1301 *et seq.*	6
49 U.S.C. §§ 1301(4) and (10)	6
49 U.S.C. § 1513	4, 7, 9, 12, 14
49 U.S.C. § 1513(a)	2, 3, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17
49 U.S.C. § 1513(b)	11, 12, 13, 14
49 U.S.C. § 1513(d)	14, 15
49 U.S.C. § 11503(a)	14, 15
49 U.S.C. § 11503(b)	14, 15
Hawaii Revised Statutes:	
Chapter 237 (General Excise Tax Law)	2
§ 237-3	2
§ 237-13	2
MISCELLANEOUS:	
Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism*, Vol. 1 (Budget Processes and Tax Systems) (January 1990)	10
Air Transport Association, *Air Transport 1990—The Annual Report of the U.S. Scheduled Airline Industry* (June 1990)	11
Air Transport Association, *The Airline Handbook* (September 1988)	4, 6, 9

TABLE OF AUTHORITIES—Continued

Page

American Society of Travel Agents, *Travel Agency Survey Results* (February 1987) 2
Dept. of Business and Economic Development, State of Hawaii, *State of Hawaii Data Book—1989* (November 1989) 2
H. Conf. Rept. 93-225, 93d Cong., 1st Sess., 1973 U.S. Code Cong. & Admin. News 1458 ..... 9, 11, 12
S. Rept. No. 93-12, 93d Cong., 1st Sess., 1973 U.S. Code Cong. & Admin. News 1434 ..... 6, 8, 9, 10, 11
U.S. Travel Data Center, *The 1989-90 Economic Review of Travel in America* (August 1990) 4, 6, 9
119 Cong. Record, Pt. 3, 3349 (Remarks of Senator Cannon) 8
119 Cong. Record, Pt. 3, 3349-3350 (Remarks of Senator Pearson) 8

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STATEMENT REGARDING CONSENT OF THE PARTIES TO THE FILING OF THE BRIEF OF THE AMICI CURIAE

This brief in support of the Petition of Travel Agents, Inc., for a Writ of Certiorari is submitted with the written consent of counsel for both parties. The written consent of counsel is being filed with the Clerk of the Court contemporaneously with this brief.

INTEREST OF THE AMICI CURIAE

Amicus Curiae, American Society of Travel Agents, Hawaii Chapter, is the largest association of travel agents in the State of Hawaii. The tour and travel industry, of which the travel agent community is an essential part, represents the largest sector of the economy of the State of Hawaii,[1] and the sale of air transportation accounts for almost two-thirds of travel agents' total sales.[2]

The decision of the Court of Appeals involves the pre-emptive effect of 49 U.S.C. § 1513(a) on State and local taxation of the "sale of air transportation".[3] More specifically, the issue presented by the Petition is whether, contrary to the decision of the Court of Appeals, 49 U.S.C. § 1513(a) prohibits the Virgin Islands from levying and collecting from a travel agent a so-called "gross receipts" tax measured against the portion of the proceeds from the "sale of air transportation" comprising the travel agent's gross commission income. Hawaii levies a so-called "General Excise Tax" or "privilege" tax against the gross receipts of all persons (and entities) engaged in business in the State. Haw. Rev. Stat. Chapter 237 (General Excise Tax Law); Haw. Rev. Stat. §§ 237-3, 237-13. The Hawaii general excise tax operates in a fashion similar to the Virgin Islands tax in issue in the case before the Court, and, although questions previously have been raised about the constitutionality of the Hawaii tax in light of the pre-emptive effect of 49 U.S.C. § 1513(a), the Hawaii State tax officials currently assess the Hawaii State general excise tax upon sales of air

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[1] Dept. of Business and Economic Development, *State of Hawaii Data Book—1989*, 336 (November 1989).

[2] American Society of Travel Agents, *Travel Agency Survey Results* (February 1987).

[3] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294 and 48 U.S.C. § 1613a(c). The District Court had jurisdiction under 48 U.S.C. §§ 1613a(a) and (b).

transportation made by travel agents measured by the gross receipts of the travel agents derived therefrom. As a consequence, the issue before the Court is one of major importance to the members of Amicus Curiae American Society of Travel Agents, Hawaii Chapter.

This brief is also being filed on behalf of thirty-two (32) individual Hawaii travel agents [4] who have or are in the process of making refund claims in respect of Hawaii State general excise taxes that were imposed and collected by the State of Hawaii from the travel agents on the gross proceeds derived by them from the sale of airline tickets. The issue presented by the Petition is also of central importance to the refund claims of these individual travel agents. Given the functional similarity between the Virgin Islands and Hawaii taxes, and the demonstrated tendency of the Hawaii courts to protect the Hawaii general excise tax,[5] the decision of the Court of Appeals, if left standing, would no doubt be embraced and followed by the Hawaii courts—and the issue of the pre-emptive effect of 49 U.S.C. § 1513(a) would most likely resurface again before the Court.

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[4] The individual travel agents who have joined the American Society of Travel Agents, Hawaii Chapter, as Amici Curiae are: A-1 Travel Services, Inc.; All About Travel; AMI Travel and Tours, Inc.; Associated Travel, Inc.; Atlantic & Pacific Travel; Bel Air Travel, Ltd.; Carl Erdman Travel; Casey & Lee Travel, Inc.; Cosmopolitan Travel, Inc.; Four Seasons Travel; Hawaii Kai Travel, Inc.; Hawaiian Pacific Travel, Ltd.; HHCL Corp. dba Jet Set World Travel; High Point Travel; HNL Travel Associates; Honolulu Club Travel; International Travel Service; Kauai Travel Service; Lahaina Travel; Momentum Travel; Murdock Travel; NTA Travel; Phillips Travel; Polo Tours International, Inc.; Ramsay Travel, Inc., dba Liberty House Travel Center; Thomas Cook Travel; Travel, Inc.; Travel Partners, Inc.; Travelers Choice, Inc.; Trips, Inc.; Universal Tour & Travel Service, Inc.; and Waikiki World Travel, Inc.

[5] *See Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 11-12 (1983).

REASONS FOR GRANTING THE WRIT

The travel agency industry, consisting of more than 35,000 travel agency locations nationwide, accounts for over 85% of all domestic airline ticket sales or approximately $45 billion annually.[6] The decision of the Court of Appeals (Pet. App. 1a-8a) subjecting travel agents to State and local taxation on the sale of airline tickets does substantial violence to 49 U.S.C. § 1513(a), which specifically prohibits State and local taxation on the "sale of air transportation" and gross receipts derived therefrom. By effectively limiting this statutory pre-emption to airlines, which are otherwise protected by the proscription in 49 U.S.C. § 1513(a) against State and local taxation on the "carriage of persons traveling in air commerce", the decision below renders part of the statute (the prohibition on taxation on the sale of air transportation) a nullity. In the process, the decision of the Court of Appeals, contrary to the specific intent of the Congress, exposes a major component of the air transportation industry to State and local taxation and the economic disruption associated therewith.

1. The Court of Appeals failed to recognize that, in enacting 49 U.S.C. § 1513(a),[7] the Congress specified *three* separate segments of the interstate air transportation system that were to be absolutely immune from State and local gross receipts taxes. In this respect, the statute speaks for itself:

> § 1513. State taxation of air commerce
>
> (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the

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[6] U.S. Travel Data Center, *The 1989-90 Economic Review of Travel in America*, 22-24, A-4 (August 1990). See Air Transport Association, *The Airline Handbook*, 30-31 (September 1988).

[7] 49 U.S.C. § 1513 is a codification of Section 7(a) of the Airport Development Acceleration Act of 1973, Pub. L. 93-44, 87 Stat. 90.

> territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on *persons traveling in air commerce*, or on *the carriage of persons traveling in air commerce* or on *the sale of air transportation* or on the gross receipts derived therefrom; . . . .

(Emphasis added.)[8] This pre-emption statute quite simply prohibits State and local excise and gross receipts taxes on three specified categories of taxpayers and activities within the air transportation industry—that is, passengers traveling in air commerce, airline carriers, and the sale of air transportation. *See, generally, Aloha Airlines, Inc. v. Department of Taxation*, 464 U.S. 7 (1983).

Until the decision below, the lower courts have not had any difficulty understanding and applying 49 U.S.C. § 1513(a) with respect to the three protected categories to which the statute is addressed.

Thus, the lower courts have understood that the proscription against the State or local taxation of "persons traveling in air commerce" precludes State and local governments from imposing head taxes or other similar taxes on airline *passengers. See, e.g., Allegheny Airlines, Inc. v. City of Philadelphia*, 453 Pa. 181, 309 A.2d 157

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[8] The Petition (at 2) regrettably misquotes 49 U.S.C. § 1513(a) by omitting the language pre-empting any State or local taxation imposed on "the carriage of persons traveling in air commerce". As discussed, *infra*, the function of the omitted language is to insulate *airlines* from State and local taxation of air commerce. The central misconception in the opinion of the Court of Appeals is in treating the separate proscription against State and local gross receipts taxes on the "sale of air transportation" as *also* limited to the taxation of airlines—as opposed to travel agents which account for over 85% of all airline ticket sales. This misconception, in turn, creates an unintended redundancy in the statute and erroneously renders a nullity the part of the statute pre-empting the State and local taxation of the "sale of air transportation".

(1973). Similarly, as the Court of Appeals for the First Circuit has pointed out, the language in 49 U.S.C. § 1513(a), which pre-empts State and local taxation on the "carriage of persons" traveling in air commerce, is meant to insulate *airlines* from State and local gross receipts taxes relating to the air transportation of passengers. *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 16 (1st Cir. 1987).[9]

The third market segment that the Congress determined ought to be protected against State and local taxation was the "sale of air transportation"—an activity dominated by *travel agents* and the travel agency industry and *not* the airlines.[10] By treating the proscription against State or local taxation on the "sale of air trans-

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[9] The speculation in *State of Arizona ex rel., Department of Revenue v. Cochise Airlines*, 128 Ariz. 432, 436, 626 P.2d 596, 600 (Ariz. App. 1981), that the language relating to the "carriage of persons traveling in air commerce" might have been added to the statute as a ban on the "taxation of *intrastate* airline fares", finds no support in the legislative history and would seem to be refuted by the language of the statute. The Federal Aviation Act of 1958, Pub. L. 85-726, 72 Stat. 737, which is codified as 49 U.S.C. §§ 1301 *et seq.*, and to which 49 U.S.C. § 1513(a) was appended as part of the Airport Development Acceleration Act of 1973, Pub. L. 93-44, Sec. 7(a), 87 Stat. 90, specifically defines the terms "air commerce" and "air transportation" as meaning "interstate, overseas, or foreign" air commerce and air transportation, respectively. 49 U.S.C. §§ 1301(4) and (10). Therefore, the term "carriage of persons traveling in *air commerce*" (emphasis added) is, by statutory definition, an "interstate" concept. The Congress, however, understood that the United States air transportation system is a national network of which all aspects and routes, including intrastate flights, are intrinsically a part of interstate commerce, and, as a consequence, subject to the pre-emptive effect of 49 U.S.C. § 1513(a). *Cf.* S. Rept. No. 93-12, 93d Cong., 1st Sess., 1973 U.S. Code Cong. & Admin. News 1434, 1446-1454.

[10] U.S. Travel Data Center, *The 1989-90 Economic Review of Travel in America, supra*, 22-24, A-4. See Air Transport Association, *The Airline Handbook, supra*, 30-31.

portation" as limited to airlines, which are already exempted by the prohibition against State and local taxation on the "carriage of persons" traveling in air commerce, the decision of the Court of Appeals creates a redundancy in the statute that the Congress could not have intended. To the contrary, in similar situations, the Court has stated that it is an " 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative' ". *Mountain States Telegraph & Telephone Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985), quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). See *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Furthermore, in *Aloha Airlines, Inc. v. Director of Taxation*, *supra*, 464 U.S. at 11-12, the Court has specifically ruled that, when the "plain language" of 49 U.S.C. § 1513(a) "expressly pre-empts" the State and local taxation of a component of the air transportation industry, the "courts need not look beyond the plain language of the federal statute to determine whether the State statute that imposes a tax is preempted."

2. The decisional law background and legislative history of 49 U.S.C. § 1513 demonstrate that the court below failed to recognize and abide by the controlling congressional determination that State and local gross receipts taxes on the "sale of air transportation" by travel agents are absolutely and *per se* prohibited. As the Court had occasion to review in *Aloha Airlines, Inc. v. Director of Taxation*, *supra*, 464 U.S. at 8-10, the statute represents a decision by the Congress to prevent by preemption a "Balkanization" [11] in the taxation of certain

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[11] The legislative history of 49 U.S.C. § 1513(a) indicates that the Congress was concerned about the "inequitable" and "potentially chaotic burden" that a "hodgepodge of Balkanized assessments" would impose on the air transportation industry if the Congress did not pre-empt State and local taxation of the essential components

segments of the air transportation industry that might otherwise have followed from the Court's decision in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

In 1970, as part of its commitment to give Federal support to expanding and improving the Nation's air transportation system, the Congress passed the Airport and Airway Development Act of 1970.[12] To underwrite the cost of this Federal support, the Congress also established the Airport and Airway Trust Fund that was to be funded by several new Federal transportation excise taxes on passengers and air freight.[13] *See, generally, Aloha Airlines, Inc. v. Director of Taxation, supra*, 464 U.S. at 8-10. The question then arose whether, in light of these Federal developments and new Federal taxes, the State and local governments were still free to impose additional taxes of their own on the air transportation industry and its customers. In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., supra*, the Court ruled that neither the Commerce Clause nor the

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of the air transportation system. *See* 119 Cong. Record, Pt. 3, 3349 (Remarks of Senator Cannon), 3349-3350 (Remarks of Senator Pearson). *See* S. Rept. No. 93-12, 93d Cong., *supra*, 1973 U.S. Code Cong. & Admin. News at 1446-1451.

[12] Pub. L. 91-258, 84 Stat. 219.

[13] The Federal transportation excise taxes are now codified, as amended, as Sections 4261 *et seq.* (dealing with the taxation of the transportation of passengers) and Sections 4271 *et seq.* (dealing with the taxation of the transportation of property) of the Internal Revenue Code of 1986 (26 U.S.C.). These provisions impose an 8% excise tax on domestic airline passenger tickets, a $3 head tax on international flights originating in the United States, and a 5% excise tax on air freight. The taxes are assessed against the *passenger* (or air freight *user*), and simply collected by the airlines and accounted for and paid over by the airlines to the Internal Revenue Service. Sec. 4291, Internal Revenue Code of 1986 (26 U.S.C.). *See* Sec. 7501, Internal Revenue Code of 1986 (26 U.S.C.).

Airport and Airway Development Act of 1970 precluded State and local taxation in this area. The Court, however, left the door open for the Congress to pre-empt State and local taxation if it determined to do so. Fearing a chaotic proliferation of local taxes and the resulting burden on interstate commerce from multiple layers of taxation, the Congress did just that by enacting the pre-emption provision that is now codified as 49 U.S.C. § 1513. *See* S. Rept. No. 93-12, 93d Cong., 1st Sess., 1973 U.S. Code Cong. & Admin. News 1434, 1446-1454; H. Conf. Rept. 93-225, 93d Cong., 1st Sess., 1973 U.S. Code Cong. & Admin. News 1458.

Given the manner in which air transportation is marketed, it is not surprising that the Congress sought to prohibit State and local gross receipts taxes on the "sale of air transportation" as well as passengers and carriers. The 35,000 travel agency locations in the United States that comprise the travel agency industry account for over 85% of *all* domestic airline tickets sales. In 1989, the domestic airline industry reported approximately $53.4 billion in total airline passenger revenues. U.S. Travel Data Center, *The 1989-90 Economic Review of Travel in America*, Table 2D at A-4 (August 1990). Of this amount, the travel agency industry accounted for about $45.6 billion in total ticket sales. *Ibid. See* Air Transport Association, *The Airline Handbook* 30-31 (September 1988). Since the announced purpose of the Congress was to immunize the major components of the air transportation system from a chaotic system of State and local head taxes and gross receipts taxes that would be imposed on top of the Federal transportation excise taxes enacted in 1970, it would have been incomprehensible for the Congress to have omitted the sale of air transporation by travel agents from the pre-emptive effect of 49 U.S.C. § 1513(a). By the same token, by exposing this essential and integral component of the air transportation system to multiple layers of State and local taxation, the decision

below opens the door to substantial uncertainty, inconsistency, and disruption in the economic structure of the air transportation industry.

The Committee Reports reflect that the Congress understood that, wherever the incidence of State and local taxation fell in the first instance, the tax would ultimately be passed on to the consumer who was already bearing the burden of the Federal transportation excise taxes enacted by the Congress. *See* S. Rept. No. 93-12, *supra*, 1973 U.S. Code Cong. & Admin. News at 1451. *Cf. Interface Group, Inc. v. Massachusetts Port Authority*, *supra*, 816 F.2d at 16. This is no less true of State and local taxes imposed on the "sale of air transportation" by travel agents, even if the tax is measured against (as in this case) the travel agents' portion of the gross proceeds derived from such sales. Of the 50 States and the District of Columbia, all but five have some form of sales or gross receipts tax, and the rates are generally higher than the 4% rate of the Virgin Islands tax in issue in this case.[14] If each extended their sales or general excise tax to cover the sale of air transportation by travel agents, as the decision below would allow, the resulting tax, even if measured against or limited to the gross receipts derived therefrom by travel agents, would equal the total *aggregate* profits realized by *all* domestic airlines in 1989.[15] It is inconceivable that this magnitude

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[14] Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism*, Vol. 1 (Budget Processes and Tax Systems) 70-74 (January 1990). In addition to State sales taxes, there are also numerous local governments with sales taxes. *Ibid.* at 76-77.

[15] The travel agent's share or commission on airline ticket sales is generally 10 percent. *See, generally, Illinois Corporate Travel v. American Airlines, Inc.*, 806 F.2d 722, 724 et seq. (7th Cir. 1986). In 1989, on total sales of air transportation of $45.6 billion by the travel agency industry, travel agents would have earned about $4.56 billion. If other State and local governments extended their sales and general excise taxes, as the decision below condones, to cover the amounts received by travel agents from the sale of air

of tax would not ultimately be passed on to airline passengers—the precise result that the Congress sought to avoid.

As envisioned by the Congress, the provision that became 49 U.S.C. § 1513(a) was to be a "*permanent prohibition.*" (Emphasis added.) H. Conf. Rept. 93-225, *supra*, 1973 U.S. Code Cong. & Admin. News at 1458. Section 1513(a) represents a legislative determination by the Congress that State and local taxation of passengers, carriers, and those involved in the "sale of air transportation" would pose an inequitable and potentially chaotic burden on interstate commerce. *See* S. Rept. No. 93-12, *supra*, 1973 U.S. Code Cong. & Admin. News at 1446. *Cf. Aloha Airlines, Inc. v. Director of Taxation*, *supra*, 464 U.S. at 11-12. By condoning the Virgin Islands tax in issue in this case, the decision of the Court of Appeals literally reopens a door that the Congress sought to shut permanently when it enacted the preemption provision of 49 U.S.C. § 1513(a). *See* H. Conf. Rept. 93-225, *supra*, 1973 U.S. Code Cong. & Admin. News at 1458. Moreover, the decision below, in effect, second-guesses the legislative determination made by the Congress that, along with passengers and carriers, the "sale of air transportation" should also be absolutely immune from State and local gross receipts taxes.

3. The approach of the Court of Appeals that 49 U.S.C. § 1513(b) should be read as a "limit[ation]" on the "broad sweep of § 1513(a)" (Pet. App. 5a) literally turns the statute on its head. Furthermore, contrary to the view expressed in the opinion below, the Court's decision in *Wardair Canada, Inc. v. Florida Dept. of Reve-*

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transportation, the amount of tax collected would approximate, if not exceed, the $189,948,000 in aggregate net profits reported by *all* United States scheduled airlines for 1989. *See* Air Transport Association, *Air Transport 1990—The Annual Report of the U.S. Scheduled Airline Industry* 4, 19 (June 1990).

nue, 477 U.S. 1 (1986), does not support any such statutory inversion.

As the Court stated explicitly in the *Aloha Airlines* [16] case, and implicitly acknowledged in *Wardair Canada*, Section 1513(a) "enumerate[s]" the specific categories of State and local taxes that are absolutely prohibited. *Ibid.* at 7-8. Section 1513(b), on the other hand, outlines the "other" types of taxes and user fees that might still be permissible. *See* H. Conf. Rept. 93-225, *supra*, 1973 U.S. Code Cong. & Admin. News at 1458.

The Congress did not intend to have Section 1513(b) function as an exception or limitation on Section 1513(a), but as a clarification of the areas to which the prohibition of Section 1513(a) "would not extend". *Ibid.* This is clear from the language of the statute:

> § 1513. State taxation of air commerce
>
> * * *
>
> (b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof, . . .) from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothting in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(Emphasis added.) As Section 1513(b) itself acknowledges, the State and local governments are simply prohibited, notwithstanding the provisions of subsection (b), from levying or collecting any of the taxes "enumerated

[16] 464 U.S. at 12 (fn. 6).

in subsection (a)", including specifically gross receipts taxes on the "sale of air transportation". *See Aloha Airlines, Inc. v. Director of Taxation, supra,* 464 U.S. at 12 (fn 6).

The legislative materials suggest that, in adding subsection (b) to the statute, the Congress simply wanted to clarify that the State and local governments were still free to impose reasonable and non-discriminatory taxes, other than those enumerated in subsection (a), on the air transportation industry and the support and peripheral industries that happened to be doing business with the air transportation industry, and, in the State or local government's capacity as the owner and operator of an airport facility, to charge airlines reasonable and non-discriminatory user fees. *Ibid. See, generally, Wardair Canada, Inc. v. Florida Dept. of Revenue, supra,* at 16 (Burger, C. J., concurring). And subsection (b) has been so applied. *See,* e.g., *Wardair Canada, Inc. v. Florida Dept. of Revenue, supra,* (aviation fuel tax upheld); *Air Jamaica, Ltd. v. State Dept. of Revenue,* 374 So. 2d 575 (Fla. App. 1979), *cert. denied,* 392 So. 2d 1371 (1980) (tax on packaged meals sold to passengers upheld). *Cf. Salem Transportation Co. v. Port Authority of New Jersey,* 611 F. Supp. 254 (S.D.N.Y. 1985) (tax on ground transportation upheld as not pre-empted by 49 U.S.C. § 1513(a)).

The Court of Appeals was, therefore, simply wrong in treating subsection (b) as creating an exemption from the pre-emptive effect of 49 U.S.C. § 1513(a). As the court said in *State of Arizona ex rel., Department of Revenue v. Cochise Airlines,* 128 Ariz. 432, 437, 626 P.2d 596, 601 (Ariz. App. 1981):

> . . . [T]he "sales taxes" referred to in § 1513(b) on the "sale of goods or services" *cannot logically include sales of air transportation or sales directly connected with the carriage of persons in air com-*

> *merce.* If § 1513 as a whole were interpreted otherwise, it would be self-contradictory.

(Emphasis added.)

Furthermore, the rationale given by the Court of Appeals for reading subsection (b) as a limitation on subsection (a) is grounded in a totally mistaken premise. According to the Court of Appeals, if subsection (b) were not read as a limitation on the pre-emptive effect of 49 U.S.C. § 1513(a), "every item paid from an airline's gross receipts, such as an airline's direct purchase of goods or services or an airline's employee's wages, would be exempt from taxation." (Pet. App. 5a.) However, an airline's purchase of packaged meals, fuel, and other similar goods and services, as well as the payment of employee wages, does not involve the "sale of air transportation"—a segment of the national air transportation system dominated by travel agents and immunized from State and local taxation by the "plain language" of 49 U.S.C. § 1513(a).

To read subsection (b), as the Court of Appeals did, to permit State and local governments to tax the gross income of travel agents derived from the "sale of air transportation" contradicts the specific language of the statute and, in effect, allows the exception to swallow up the rule.[17]

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[17] The conclusion that 49 U.S.C. § 1513(a) specifies certain categories of State and local taxation that are *absolutely* or *per se* pre-empted is unavoidable when 49 U.S.C. § 1513 is compared with 49 U.S.C. §§ 11503(a) and (b). 49 U.S.C. § 11503(a) and (b) are the cognate provisions of the Revised Interstate Commerce Act, Pub. L. 95-473, 92 Stat. 1445, that contemplate the pre-emption of certain State and local taxes that unreasonably burden and discriminate against interstate *rail* transportation.

In 1982, the Congress amended 49 U.S.C. 1513(b) and added new subsection (d) to 49 U.S.C. § 1513 to specify that the permissible types of State and local taxes referenced in subparagraph (b) were still subject to a general limitation that any such taxes could not unreasonably burden or discriminate against interstate

4. Finally, in order to avoid the pre-emptive effect of 49 U.S.C. § 1513(a), the Court of Appeals characterizes the Virgin Islands tax as a tax on the "commissions earned by a travel agent for providing services" and not on the sale of air transportation. As the Court pointed out in another context, however, "this is a bit of verbal logic from which the meaning of things has evaporated." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 191 (1941).

In the first place, as the Court reiterated in *Western Air Lines, Inc. v. Board of Equalization of South Dakota*, 480 U.S. 123, 129-130 (1987), a state legislature's characterization" of a tax cannot shield the tax if it is preempted by 49 U.S.C. § 1513(a). *See Aloha Airlines, Inc. v. Director of Taxation, supra*, 464 U.S. at 13-14. The statute by its terms pre-empts State and local taxation "directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom." Since the travel agency industry accounts for over 85% of all airline ticket sales, travel agents are, for all intents and

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air transportation. Pub. L. 97-248, Title V, § 532, 96 Stat. 701. 49 U.S.C. § 1513(d) is literally the mirror image or air transportation version of 49 U.S.C. §§ 11503(a) and (b), the provisions dealing with rail transportation. Both sets of provisions contemplate a "balancing test" to determine whether a State or local tax unreasonably burdens or discriminates against interstate transportation in the market segments covered by each respective statute. *Cf. Western Air Lines, Inc. v. Hughes County*, 372 N.W.2d 106 (S.D. 1985), *aff'd*, 480 U.S. 123 (1987).

There is no parallel or equivalent of the absolute pre-emption provision of 49 U.S.C. § 1513(a) in the rail transportation statute. Furthermore, the absolute proscription of 49 U.S.C. § 1513(a) is not subject to any "balancing test" respecting the burden on interstate commerce or the discriminatory effect of a State or local tax. To the contrary, 49 U.S.C. § 1513(a) represents the legislative determination of the Congress that the State and local taxation of passengers, carriers, and the sale of air transportation unduly burdens air commerce and is *absolutely* pre-empted. This is not a matter that the Congress left open to the courts.

purposes, the mechanism for the "sale of air transportation".

Additionally, besides being involved in the sale of air transportation on behalf of the airlines, the travel agency industry has "increasingly" engaged in the practice of buying "seats" for resale. *See Illinois Corporate Travel v. American Airlines, Inc.*, 806 F.2d 722, 725 (7th Cir. 1986). This is a common practice among the members of the Amici Curiae, who often acquire (and take into inventory) airline coupons which they then resell *for their own account.*

In both instances, whether acting on behalf of the airlines or its own account, the travel agent is involved in the sale of air transportation. It is precisely this activity and the gross receipts derived therefrom that 49 U.S.C. § 1513(a) puts beyond the power of State and local taxation. That the Virgin Islands tax is measured against the portion of the gross proceeds from the sale of air transportation received by travel agents does not make the tax any less a prohibited tax on the "sale of air transportation". *Cf. Aloha Airlines, Inc. v. Director of Taxation, supra,* 464 U.S. at 13-14.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted. The decision of the Court of Appeals contravenes the plain language of 49 U.S.C. § 1513(a) and, in the process, has impermissibly and erroneously substituted the judgment of the court on a matter on which the Congress has made a clear legislative determination. By opening up the sale of air transportation by travel agents to State and local gross receipts taxes, the decision below creates the possibility of a substantial disruption in the economic structure of the sale of air transportation as part of the national air transportation system. The decision of the Court of Appeals will also surely result in widespread litigation concern-

ing the pre-emptive effect of 49 U.S.C. § 1513(a) as more and more States and local governments move to extend their sales and gross receipts taxes to the "sale of air transportation" by travel agents—an area which the Congress intended to be out of bounds to State and local taxation of the type involved in this case.

Respectfully submitted,

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